

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHRIS GOLDBECK</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 227,739
<b>ACCORD HUMAN RESOURCES, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>CREDIT GENERAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the October 5, 1998 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on May 5, 1999.

**APPEARANCES**

Joseph S. Seiwert of Wichita, Kansas, appeared for the claimant. Gregory D. Worth of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Also, at oral argument to the Appeals Board, the parties stipulated that claimant's average weekly wage working for Team One was \$359.49.

**ISSUES**

This is a claim for a September 6, 1997 accident and resulting low back injury. Averaging a 35 percent task loss with a 43 percent wage loss, the Judge awarded claimant a 40 percent permanent partial general disability. Also, the Judge awarded claimant additional temporary total disability benefits for the period from October 11, 1997, through November 2, 1997.

Respondent and its insurance carrier contend the Judge erred by finding that claimant sustained an accident on September 6, 1997. They argue that the increased symptoms that claimant experienced on that date are from back injuries that he sustained in both 1995 and 1996. Respondent and its insurance carrier also contend that the Judge erred by awarding claimant permanent partial general disability benefits greater than the

functional impairment rating. They argue that claimant found employment earning a comparable wage and, therefore, he should not be rewarded with a work disability after quitting that job. Next, they contend the Judge erred by awarding temporary total disability benefits for any period after October 10, 1997, when the treating surgeon released claimant to return to light duty work and also rated him. Finally, they argue that any award of permanent disability benefits should be reduced by an 8 percent preexisting impairment.

The issues before the Board on this appeal are:

1. Did claimant either aggravate or injure his back while working for the respondent on September 6, 1997?
2. If so, what is the nature and extent of the injury and disability?
3. Is claimant entitled to temporary total disability benefits for the period from October 10, 1997, through November 2, 1997?
4. If claimant is entitled to receive permanent partial general disability benefits, is there a preexisting impairment that should be deducted from the award?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. The Appeals Board affirms the Judge's finding that Mr. Goldbeck injured his low back while moving a filing cabinet on September 6, 1997. Mr. Goldbeck's testimony of how the injury occurred is substantiated by his then co-worker and then son-in-law Christopher James. Also, Mr. Goldbeck's testimony is uncontroverted that he reported the incident to his supervisor on the same day that it occurred. Mr. Goldbeck had some symptoms following low back surgery in April 1995. But after recovering from a heart angioplasty procedure in 1996, he was able to do his supervisory job for his employer, Accord Human Resources, until the September 1997 filing cabinet incident.

2. The Board finds that on September 6, 1997, Mr. Goldbeck sustained additional back injury that arose out of and in the course of employment with Accord Human Resources. In reaching that finding the Board was persuaded by both Mr. Goldbeck's testimony and that of board certified orthopedic surgeon Dr. Edward J. Prostic. Dr. Prostic testified that Mr. Goldbeck probably stretched or pinched a nerve lifting the filing cabinet, which then caused swelling and intense low back pain.

3. As a result of the September 1997 back injury, Mr. Goldbeck had a second operation on his low back. According to Dr. Richard V. Smith, the board certified neurosurgeon who operated on Mr. Goldbeck's back in both 1995 and again in September 1997, Mr. Goldbeck's whole body functional impairment increased from 8 percent to 12 percent because of the September 1997 surgery. According to Dr. Prostic, Mr. Goldbeck's whole body functional impairment has increased from 8 percent to 22 percent as a result of the

September 1997 accident. In formulating their ratings, both doctors used the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment.

4. Giving Dr. Prostic and Dr. Smith's opinions of functional impairment equal weight, the Board averages the 22 and 12 percent ratings and finds that Mr. Goldbeck's whole body functional impairment is now 17 percent as a result of the September 1997 accident and resulting back surgery.

5. The Board affirms the Judge's finding that Mr. Goldbeck has lost the ability to do 35 percent of the work tasks that he did in the 15-year period preceding the date of accident. That finding is based upon Dr. Prostic's testimony which indicated that Mr. Goldbeck had lost the ability to do 7 of 20 former work tasks.

6. Likewise, the Board affirms the Judge's finding that Mr. Goldbeck now earns 43 percent less than what he was earning on the date of accident. That percentage is derived by comparing the \$627.37 that Mr. Goldbeck was earning on the date of accident to the \$359.49 that he is now earning working for a different company, Team One.

7. After recovering from the September 1997 back surgery, Mr. Goldbeck attempted to meet with Accord Human Resources to discuss his return to work. The company's representative did not appear at their scheduled meeting. Later, a company supervisor told Mr. Goldbeck that the company would not take him back to work because he had hired an attorney to represent him in this workers compensation claim. Doubting that Accord Human Resources would accept him back to work, in early November 1997 Mr. Goldbeck began working for Team One, a company that installs television satellite systems.

8. The Judge found that Mr. Goldbeck began working for Team One on or about November 3, 1997. The parties do not dispute that finding. Therefore, the Board adopts it as its own. Mr. Goldbeck continued to work for Team One through the date of the regular hearing.

9. On February 9, 1998, Mr. Goldbeck began working for York International soldering air conditioning units. On March 5, 1998, he quit that job. Several factors played a role in the decision to terminate. First, Mr. Goldbeck believed he had been promised either \$8.05 or \$8.06 per hour but he was only paid \$7.56 per hour. Second, the job required constant bending, an activity that bothered his back. Third, the soldering fumes bothered him. Fourth, he did not like working second shift. Fifth, he thought he had an opportunity to obtain a better job at a local aircraft plant.

10. As a result of the September 1997 accident, one of the permanent work restrictions placed on Mr. Goldbeck was to avoid repetitive bending. Based upon Mr. Goldbeck's uncontroverted description of the work he did for York, the Board finds that the job at York International violated the work restriction and limitation against bending. Further, considering the approximate 20 hours of overtime that York required Mr. Goldbeck to work each week, the Board is persuaded that the soldering job bothered his back.

11. Considering the entire record, the Board finds that Mr. Goldbeck made a good faith effort to find appropriate employment after Accord Human Resources refused to take him back to work.

12. On October 10, 1997, Dr. Smith wrote Accord Human Resources and advised that Mr. Goldbeck had significant improvement following the back surgery two weeks earlier. The doctor wrote, in part:

Chris Goldbeck is now two weeks following his re-exploratory left L5-S1 laminectomy for recurrent disk rupture. Mr. Goldbeck has experienced significant improvement in his pain. His analgesic requirements have been Lortab and Soma at bedtime. He has returned to light duty work and has avoided lifting and bending. . . .

**RECOMMENDATIONS:**

1. Continue light duty work with a four-week 10-15 lb weight lifting restriction and avoiding repetitious bending, stooping, climbing and crawling.
2. Refill prescription for Lortab 7.5 mg #48 tablets with one refill. A Soma 350 refill was not necessary although if the patient requires such a call-in prescription can be obtained.
3. Begin Williams exercises.
4. This patient exhibits a 12% temporary [sic] impairment to the body as a whole based on the A.M.A. Guides, fourth edition and is based on the 9/23/97 re-exploratory lumbar laminectomy.
5. Mr. Goldbeck's overall prognosis continues to be very favorable.

The record does not indicate what light duty work Mr. Goldbeck was supposedly doing that Dr. Smith mentioned in his letter.

13. Because of Dr. Smith's October 10, 1997 letter, the insurance carrier discontinued Mr. Goldbeck's temporary total disability benefits. Based upon the wording of that letter, which indicates that Mr. Goldbeck remained under active medical treatment for the back surgery that he had undergone only two weeks earlier, the Board finds that Mr. Goldbeck was temporarily and totally disabled for the period from October 10 through November 2, 1997, the approximate date when he began working for Team One.

14. As indicated above, the Board finds that before the September 6, 1997 accident Mr. Goldbeck had an 8 percent whole body functional impairment because of an earlier back injury and surgery.

**CONCLUSIONS OF LAW**

1. On September 6, 1997, Mr. Goldbeck injured his back while working for Accord Human Resources. The accident arose out of and in the course of his employment with Accord.

2. Because he injured his back, Mr. Goldbeck's permanent partial general disability is determined by K.S.A. 1996 Supp. 44-510e. That statute provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must also be read in light of Foulk<sup>1</sup> and Copeland.<sup>2</sup> In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon the ability to earn rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

3. The Board finds that Mr. Goldbeck made a good faith effort to find appropriate employment after recovering from the September 1997 back surgery. Therefore, the actual difference in pre- and post-injury wages should be used in the wage loss prong of the disability formula. The Board finds and concludes that the job that Mr. Goldbeck was doing for York International was not appropriate when considering his permanent work restrictions and limitations against bending. Further, Mr. Goldbeck has not attempted to wrongfully manipulate his workers compensation award as prohibited by Foulk.

4. Averaging the 35 percent task loss with the 43 percent wage difference yields 39 percent from which the preexisting 8 percent functional impairment is subtracted.<sup>3</sup> Therefore, Mr. Goldbeck is entitled to receive an award for a 31 percent permanent partial general disability.

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<sup>1</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>3</sup> K.S.A. 1996 Supp. 44-501(c).

5. Based upon the above, the Award should be affirmed to the extent that it granted temporary total disability benefits for the period of October 10 through November 2, 1997, but modified to decrease the amount awarded to a 31 percent permanent partial general disability.

**AWARD**

**WHEREFORE**, the Appeals Board modifies the Award dated October 5, 1998, to decrease the permanent partial general disability from 40 percent to 31 percent.

Chris Goldbeck is granted compensation from Accord Human Resources, Inc. and Credit General Insurance Company for a September 6, 1997, accident and a 31% permanent partial general disability. Based upon a \$627.37 average weekly wage, Mr. Goldbeck is entitled to receive 8.14 weeks of temporary total disability benefits and 128.65 weeks of permanent partial general disability benefits at \$351 per week for a total award of \$48,013.29.

As of June 1, 1999, 90.43 weeks, or \$31,740.93, of benefits are due and owing and ordered paid less any amounts previously paid. The remaining benefits, or 46.36 weeks totaling \$16,272.36, are ordered paid as they accrue, subject to review and modification by the Director.

The Appeals Board adopts the other orders contained in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph S. Seiwert, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director